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IN THE

Supreme Court of the United States

October Term, 1973

No. ~~73~~ - 1263

THE PEARSON BROS. COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, and the Associated Justices of the Supreme Court of the United States.

This is a petition by The Pearson Bros. Company for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case.

I.

OPINIONS DELIVERED IN COURTS BELOW

The United States Court of Appeals for the Seventh Circuit entered a decision without opinion. The decision is 486 Fed.2d 1406.

II.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Seventh Circuit handed down its order on October 2, 1973, and the judgment sought to be reviewed was entered on November 19, 1973. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is Section 1254 of Title 28 of the United States Code.

III.

QUESTION PRESENTED

The question presented for review is that where National Labor Relations Board found that the employer had economic reasons at the time of the layoff that would justify a reduction in the work force, can the National Labor Relations Board order the reinstatement of all twelve employees who were laid-off and who were union adherents, and thereby in effect permit only the laying off of non-union adherents.

IV.

STATUTE INVOLVED

The statute of the United States involved is 29 U.S.C., Section 158(a)(3) which provides as follows:

> "Section 8(a) It shall be an unlawful labor practice for an employer–
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Provided, That mothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the the authority of such labor organization to make such an agreement: Provided further, That no

employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

V.

STATEMENT OF CASE

A complaint was filed by the General Counsel fo the National Relations Board alleging interrogation and threats in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, and the layoff and/or discharge of twelve employees in violation of Section 8(a)(3) and (1) of the Act. The employer denied that it committed any unfair labor practices. The case was tried before a Trial Examiner who thereafter filed his decision finding that the employer coercively interrogated its employees concerning union activities and threatened them with reprisals for engaging in union activities and laid off and/or discharged twelve employees because of their union activities. The employer filed exceptions to the Trial Examiner's Decision and upon review, the National Labor Relations Board entered a decision and order affirming the rulings, findings and conclusions of the Trial Examiner and ordered the employer to

cease and desist from coercively interrogating any of its employees concerning union activities or threatening employees with reprisals for engaging in union activities and from laying off, discharging or otherwise discriminating against any employee for supporting any labor organization. The National Labor Relations Board further ordered the reinstatement, with back pay, of the twelve employees laid off. The petitioner field a Petition to Review before the United States Court of Appeals for the Seventh Circuit and the National Labor Relations Board filed a cross-application for enforcement of the order. The United States Court of Appeals for the Seventh Circuit denied the Petition for Review and ordered the enforcement of the order of the National Labor Relations Board.

The employer, Pearson Bros. Company, is engaged in the manufacture of farm equipment, and principally liquid manure spreaders. During the year 1971 it had obtained a large contract with Avco for the manufacture of this equipment and this one contract accounted for approximately one-third of the employer's production. On January 12, 1972, Leland Pearson, president of the employer, along with Ed Mendenhall, met with representatives of Avco at Cold Water, Indiana. They had expected to obtain a similarly large order from Avco for the year 1972, but at this meeting they learned that Avco had approximately 40% of the 1971 production still on hand and unsold. Consequently, the employer received no new order from Avco as expected.

The situation of the employer was further complicated by the fact that these spreaders all use a pump manufactured in Italy. The shipment of pumps from Italy had

been delayed. The pumps that should have reached the employer on December 10, 1971, did not arrive until February, 1971, and then only 100 of the 140 pumps ordered arrived. Therefore on January 12, 1971, the employer's inventory of pumps was depleted and it was not economical to build these spreaders without the pump. Gene Nelson, the plant superintendent, urged Leland Pearson to lay off employees early in December, but Mr. Pearson refused to lay off any employees before Christmas. Leland Pearson realized some time in December, 1971, that a layoff was likely if the Avco order was not renewed. During the week prior to January 12, 1972, he explained the possibility of a layoff to the Cooperation Committee, made up of employees, and asked them for advice or recommendations as to a layoff procedure.

After the meeting with the representatives of Avco on January 12, Leland Pearson and Ed Mendenhall made the decision that the employer would have to cut production by thirty per cent and would have to lay off a number of employees. Their return to the employer's plant was delayed because of a snow storm so Leland Pearson called Vernon Pearson (vice-president of the employer) and asked him to determine who could be laid off without disrupting production and suggested that he talk to the plant superintendent, Gene Nelson.

The employer had no procedure or criteria for layoff and had never had any substantial layoff of employees prior to this date.

Leland Pearson then discussed the layoff with the plant superintendent, Gene Nelson, and Gene Nelson offered the names of several of the employees who he felt would

not be needed in view of the curtailment of production. On January 13, 1972, nine employees were laid off and on the following day three more employees were laid off.

The first union contact with any of the employees was made by a representative of the International Molders and Allied Workers union with employee, Harry Lambert, at his home on January 3 or 4, 1972. There is no evidence of any union activity at the plant of the employer until January 10, 1972.

Prior to January 3, 1972, the employer had no organizational chart, job classifications or seniority list. It had no system of rating employees or reviewing the performance of the employees on any systematic or regular basis. When an employee asked for a raise, it would consider the request and either grant or deny the raise to that particular employee. The employer recognized that this lack of organization and procedure caused inequities, and it started in the fall of 1971 to formulate a job classification and pay scale system. This project was principally assigned to Ed Mendenhall and he worked on this during the latter part of 1971. It was finally prepared and explained to the employees, to be effective January 3, 1972.

The employer first established a Wage Classification and Schedule. This chart sets out the labor grade and job title for the different job operations of the employer and was intended as a classification of jobs and not of the individual employees. No employees are listed on the chart, only jobs. After all the jobs were classified as to the labor grade and wage schedule, the names of the particular employees were related to the job titles. It was not the purpose initially to rate the employees, rather this initial classification was to establish labor grades and job titles. Each employee was listed opposite the job

title he was performing. This process of indexing the employees by job title was accomplished, but the employer was not finished with its task of organization. Still to be accomplished was the task of rating the individual employees and necessarily shifting some employees from their present job classification into a classification that would be more nearly descriptive of their skill and ability.

The wage classification and schedule provides that a new employee undergoes a work review at the end of a 90 day probationary period.

Of the twelve employees who were laid off, five (Jones, Wessels, Strouse, Washburn and Bainbridge) were among the twelve employees with the least seniority. Four of the employees laid off were among the eleven lowest paid full-time employees (Jones, Wessels, Washburn and Dunn).

The National Labor Relations Board found the employer engaged in interrogations and threats in violation of Section 8(a)(1) of the National Labor Relations Act. Armed with this finding, the National Labor Relations Board found that the layoff of each and every employee, regardless of the employee's seniority, wage scale, or other evaluation of performance, was prompted because of their union activities and required the reinstatement of all employees. The enforcement of this order by the United States Court of Appeals for the Seventh Circuit denied the right of the petitioner to select union adherents for layoff when such layoff is justified by economic reasons.

The basis for federal jurisdiction in the court of first instance is Section 161(f) of Title 29 of the United States Code.

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The decision of said Court of Appeals as to the right of the petitioner to layoff union adherents where the petitioner had economic reasons which would justify a reduction of force, by ordering the reinstatement of all employees laid off, involves an important question of federal law which has not been, but should be, settled by this court.

2. The decision of said Court of Appeals as to the right of the petitioner to layoff union adherents where the petitioner had economic reasons which would justify a reduction of force, by ordering the reinstatement of all employees laid off, so far departs from the accepted and usual course of judicial proceedings, or so far sanction such a departure by the National Labor Relations Board as to call for an exercise of this court's power of supervision.

The employer, being faced with the necessity of an economic layoff, had the decision of what employees were to be laid off. There are no specific standards set forth in the NLRA as to the order in which employees are to be laid off – this remains the prerogative of the employer. The employer had never had a lay off of any significance in all of its history. It had established no precedent and had adopted no procedure for determining the employees to be laid off. This was a case of first impression as far as this company was concerned. The president of the company had even brought up the subject about layoffs at the Co-operation Committee meeting prior to January 12, and asked for suggestions from the employees on the committee, but the employees had no suggestions.

The twelve employees with the least seniority were:

Name	Date Hired	Name	Date Hired
*Jones, Ed	1- 3-72	Osborne	9-28-71
*Wessels	12-14-71	Lindsey	9-27-71
Bowyer	12-13-71	Bazzoli	9-27-71
*Strouse	9-29-71	*Washburn	9-22-71
Watson	9-29-71	Luallen	9-20-71
Thompson	9-28-71	*Bainbridge	9-10-71

The eleven employees receiving the lowest hourly wage were:

Name	Wage	Name	Wage
*Jones, Ed	$2.50	Milroy	$2.60
*Wessels	2.50	Simmons	2.60
Thompson	2.50	*Dunn	2.65
Layman, R. E.	2.55	Pennington	2.65
Fritch	2.60	*Washburn	2.65
Galloway	2.60		

*These employees were among the twelve employees laid off.

The Trial Examiner found that a reduction in force for economic reasons was justified. The employer had suffered a loss of work that amounted to approximately thirty per cent of its production, and at the time the employer had approximately seventy-five production workers. Because of this loss of work, the employer laid off twelve employees which was not found to be excessive. The General Counsel did not contest the proposition that a reduction in force for economic reasons was justified and the National Labor Relations Board specifically found that a reduction in force for economic reasons was justified. It does not follow then that every union adherent caught in the layoff was automatically a discriminatee. The employer had a legitimate reason for a reduction in force and certainly some of the union supporters would have to be laid off.

The National Labor Relations Board has historically attacked layoffs as being discriminatory when they are not based upon seniority. *Master Dynamics Corp. and James L. Dunlap,* 180 NLRB (No. 121); *Troxel Manufacturing Co. and United Packing House Workers,* 174 NLRB (No. 127); *Frank Miller's Sons Fireproofing Co. and United Order of American Bricklayers and Stonemasons,* 164 NLRB (No. 29); *Evening News Assn. and American Newspaper Guild,* 146 NLRB 841. However, in the present case, the National Labor Relations Board refused to honor any of the layoffs as being non-discriminatory.

All new employees undergo a normal ninety day probationary period. Both Jones and Wessels were in the probationary period and had the least seniority in the entire plant. The National Labor Relations Board found that the layoff of Edwin Jones, who was the newest employee with only ten days seniority, and the layoff of William Wessels, who was the second newest employee with only thirty days service, was discriminatory. This ruling seems indefensible when the employer had a legitimate reason for a layoff because of a thirty per cent loss of work. Apparently under the decision, the employer was permitted only to lay off nonunion sympathizers. This is certainly not the intention of N.L.R.B. Section 8(a)(3).

Referring to the wage scale, Jones and Wessels were the two lowest paid employees in the entire production force, both earning $2.50 per hour, as well as having the least seniority. There were a total of eleven employees who earned $2.50 per hour or less among the seventy-five production workers and Washburn and Dunn were also among the eleven lowest paid employees. Consequently, Jones, Wessels and Washburn were not only among the twelve employees with the least seniority, but they were likewise among the eleven employees receiving

the lowest wage. Certainly the wage scale and the lack of seniority are the most common criteria for layoffs.

The National Labor Relations Board has recognized that even though an employer may be guilty of unlawful acts of threats and interrogation against the employees, the employer is still permitted to lay off union activists where a legitimate reason for a reduction in force exists. In the case of *Research Designing Service, Inc. and Local 155 Auto Workers,* 141 NLRB 211, the Board said:

> "When the factors noted below are weighed in the light of this pattern of illegal conduct, it is apparent to us that Respondent was unlawfully motivated in making certain layoffs. But it does not follow, as the General Counsel would have us find, that because the Respondent, under the cover of its economic situation, sought to weaken the Union's position by laying off union adherents, that every union adherent caught in the layoff was automatically a discriminatee. Respondent did have a legitimate reason for a reduction in force, and it is probable that some of the individuals would have been laid off even if there had been no union on the scene. Whether or not a particular individual had suffered discrimination must turn not simply on whether he was a union member, but on a number of other factors. In determining whether an alleged discriminatee was in fact selected for layoff for anti-union reasons, we have taken into consideration: (1) whether his name was on the Union's lists submitted to Respondent; (2) whether he had been laid off in previous (1960 or 1961) economic reductions; (3) his seniority

> or length of service with Respondent; (4) his rate of pay as compared with others retained in similar job categories; and (5) interrogations or threats directed against him."

The National Labor Relations Board found there was an economical justification for a layoff, and did not find that the layoff of twelve men was excessive in view of the thirty per cent loss of work. Consequently, the employer was justified in laying off twelve employees. The decision below would require the employer to lay off only nonunion sympathizers in order to avert a charge that the selection of employees was discriminatory. If the employer has a legitimate basis for an economic layoff, then he should be permitted to lay off the most logical employees, regardless of their union affiliations. Where a legitimate layoff is authorized, the employer should not be penalized for laying off those persons with the least seniority and the lowest hourly rate, particularly when these employees are singled out by the plant superintendent as being the least necessary.

The employer, at the very least, was authorized to lay off Jones, Wessels, Strouse, Washburn and Bainbridge who were among the twelve employees with the least seniority. In addition, the layoff of Dunn was authorized since Dunn was among the lowest paid employees in the plant, suffered from a serious health problem that prevented him from doing production work and was engaged in a nonessential job as errand man. Ignoring all the evidence offered by the employer as to the qualifications of the employees laid off and the basis for their selection certainly the employer is entitled to lay off the foregoing six employees.

VIII.

CONCLUSION

Wherefore, The Pearson Bros. Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case.

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APPENDIX

TRIAL EXAMINER'S DECISION

Statement of the Case

Arnold Ordman, Trial Examiner: This case was tried in Peoria, Illinois, on April 10, 11, and 12, 1972 on a complaint issued against Respondent by General Counsel on February 29, 1972, pursuant to charges filed on January 18, 1972, and February 23, 1972. The complaint as amended at the hearing[1] alleges interrogation and threats in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, and the layoff and/or discharge of 12 employees in violation of Section 8(a)(3) and (1) of the Act. Respondent denies that it committed any unfair labor practices.

Upon the entire record, upon my observation of the witnesses, and after due consideration of the briefs filed by General Counsel and by Respondent, I make the following:

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[1] At the opening of the hearing General Counsel moved to amend the complaint by adding an allegation that International Molders & Allied Workers Union was a labor organization within the meaning of Section 2(5) of the National Labor Relations Act, as amended, and additional allegations relating to further interrogation and threats in violation of Section 8(a)(1) of the Act. Respondent opposed the motion to amend limiting its opposition to the allegation relating to the Molders Union and pleading surprise. As the facts hereinafter set forth, the Molders Union was more directly involved in the instant controversy than the Charging Party. The motion to amend was granted with leave to Respondent to renew its request if it could show prejudice during the course of the hearing. No claim of such prejudice was made or tendered and the ruling on the motion stands.

Findings and Conclusions

I. Jurisdiction

Respondent, an Illinois corporation, manufactures and sells liquid manure spreaders at its plant in Galva, Illinois. Both its interstate shipments of goods and materials and its receipt of goods and materials from outside the State of Illinois exceed $50,000 in value. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent further admits that the Teamsters Union, the Charging Party, is a labor organization within the meaning of Section 2(5) of the Act and, for purposes of this proceeding, that the Molders Union (see note 1, supra) is a labor organization with the meaning of that Section. I so find.

II. The Alleged Unfair Labor Practices

A. Background; The Issues

On January 3, 1972 Respondent had at its Galva, Illinois, plant a relatively stable complement of approximately 75 production and maintenance employees. About 17 of these employees were on a part-time schedule. There was no union at the plant.

Dissatisfaction with certain working conditions gave rise to some concerted activity among the employees in 1971. When the employees brought their dissatisfactions to the attention of management, a Cooperation Committee was formed at management's suggestion in late August or early September 1971 to deal with the employees grievances. The Committee was composed of five employees representing different departments in Respondent's plant and several meetings were held between the Committee and management over the next few

months. Talk of union organization which had taken place among the employees before the Committee was formed dwindled during the brief existence of the Committee. Late in December and early in January 1972 it revived, culminating in a meeting at the Wagon Wheel Tap in Galva, Illinois, on January 10, 1972, where a number of employees signed authorization cards for the Molders Union. A few more Molders Union cards were signed within the next day or so, making a total of 22 card-signers among the approximately 75 employees in Respondent's employ. On January 13, 1972, 3 days after the Wagon Wheel meeting, the employment of nine employees was admittedly terminataed and on the following day, January 14, three more omployees were admittedly terminated.[2] All 12 employees terminated were full-time employees and were among the 22 who had signed cards. General Counsel contends that the selection for termination of these 12 union adherents from a work force of approximately 75 production and maintenance employees were dictated by antiunion considerations. Respondent counters with the claim that the terminations were the result of a reduction in force dictated by a falloff in available work and that the selections were made on the basis of the versatility of employees to meet the needs of a continuing operation with a more limited work output.

During this same period Respondent's officials allegedly engaged in interrogation and threats directed against the union activity of the employees. Involved in this conduct were Carl Peve and Lester Morrell who, General Counsel contends and Respondent denies, were supervisors for whose actions Respondent was answerable.

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[2] While these events were taking place, several employees signed authorization cards for the Teamsters Union.

The issues presented are:

1. Whether Carl Peve and Lester Morrell were supervisors within the meaning of Section 2(11) of the Act.

2. Whether Respondent's officials, including Peve and Morrell, engaged in interrogation and threats in violation of Section 8(a)(1) of the Act.

3. Whether the layoff and/or discharge of 12 Union adherents on January 13 and 14, 1972, was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act.

B. The Supervisory Status of Peve and Morrell

1. Carl Peve

The evidence as to the supervisory status of Carl Peve was in sharp conflict. Generally speaking, Respondent's president, Leland Pearson, its vice-president, Vernon Pearson, brother of Leland, and E.L. Mendenhall, assistant to the president, denied that Peve was a department head, foreman, or leadman, and asserted that Peve exercised no supervisory functions. Vernon Pearson testified that Peve had no title or job classification as such and that his sole function was that of troubleshooter. Mendenhall testified that Peve was a troubleshooter, expediter and inspector, that one of his functions was to oversee the operations of the paint department but that Peve operated only under the direction of Gene Nelson, Respondent's general foreman. Carl Peve's own testimony was to the effect that he was not a leadman, foreman or department head, that he exercised no supervisory functions and that he did not train new employees. Peve testified further that he performed the function of troubleshooter and inspector and that he never gave an order to an employee unless specifically directed to do so by the general foreman, Gene

Nelson, or by one of the Pearson brothers. It also appeared that Peve was paid at an hourly rate whereas all the admitted supervisors in Respondent's hierachy were on a salary basis.

On the other hand, testimony of employees was to the effect that Peve was identified to them by management as being a supervisor and that Peve, in fact, exercised supervisory functions. Employee Harry Fritch testified Vernon Pearson took him on a tour of the plant, and identified Carl Peve as assistant shop foreman. Employee Edwin Jones, also hired by Vernon Pearson when he applied for work in mid-December, testified that Vernon Pearson introduced him to Carl Peve with the statement, "Ed Jones, this is Mr. Carl Peve. This is your Foreman—your boss. You do what he says." Employee James L. Bainbridge, hired in September 1971, testified to like effect. Vernon Pearson introduced Bainbridge to General Foreman Nelson and Carl Peve. Vernon Pearson left. Nelson then told Bainbridge that Nelson and Carl Peve "run the shots [sic] and Carl would be my boss." Employee William Washburn, hired by Vernon Pearson in September 1971, testified that Vernon Pearson took him to the paint department on the day he started work, introduced him to Carl Peve and said, "This is the man you will be working under."

Testimony was also given by employees as to Peve's functions. Harry Fritch who was transferred to the paint department after a few months in the shipping department, testified that his assignments in the paint department were given to him by Carl Peve and that Carl Peve also told other employees in the paint department what to do.[3] Bainbridge likewise testified that Peve gave directions to the employees in the paint department. In addition, employees Harry Lambert,

[3] There were about six employees in the paint department.

William Wessels,[4] Rodney Mackie and Joseph Bickett testified that Peve issued orders and assignments to employees and directed them to redo jobs inadequately or improperly done. With respect to other aspects of Peve's authority, Lambert testified that Lester Morrell told him he would have to consult Peve or Nelson about a possible transfer to the shipping department, that he did consult Peve and, after his third effort in this regard, Peve told him his transfer was effective. William Washburn testified that he discussed overtime work with Peve and that on a few occasions Peve gave him time off. Rodney Mackie stated that Peve gave him his assignments, informed Mackie that his job performance was inadequate, watched his work and later discharged him.

Even more significant in this regard was other testimony vouchsafed by Respondent's top officials. Vernon Pearson, a very difficult or confused witness who, as already noted, denied Peve's supervisory status, acknowledged that on occasion, when he or his brother were absent from the late afternoon shift and the part-time employees were at work, Peve was in charge of, and responsible for, the operation on that shift. President Leland Pearson conceded that Peve could fairly be characterized as a multi-department leadman. Leland Pearson admitted also that in an affidavit he had furnished to a Board investigator in February 1972, he had listed Carl Peve among Respondent's foremen and leadmen and stated further that among Peve's duties was that of overseeing the paint room. In this connection Leland Pearson testified also that foremen or leadmen had the authority to recommend the hire or discharge of employees and that in the event of such a recommendation,

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[4] The incorrect spelling "Wessells" was corrected at the hearing.

the odds were very high that the recommendation would be accepted. Relevant here, also, is the fact that Respondent, on or about December 29, 1971, prepared a complete roster of its rank-and-file employees from which supervisory personnel were excluded and that the name of Peve was not on that list.[5]

In sum, it appears that Peve's job as inspection expediter and troubleshooter gave him wide range and scope throughout Respondent's enterprise with special attention to the paint department. Cogent evidence, not seriously challenged, establishes that Peve made job assignments, issued orders and ararnged for transfers, temporary or otherwise. Respondent sought to explain away these obvious indicia of supervisory status on the ground that Peve did not bear the title of foreman, department head, or leadman, that Peve was paid an hourly rate rather than a salary, and that to the extent he gave orders to employees, he was in each instance merely relaying specific directives from General Foreman Gene Nelson.

The explanations are vulnerable. As indicated, several employees testified that Vernon Pearson, upon their entrance into employment, introduced or identified Peve to thm as assistant foreman or boss or the man they would take orders from or work under. I credit that testimony. Leland Pearson acknowledged that he had listed Peve among the foremen and leadmen in Respondent's employ, that Peve could fairly be called a multi-department leadman, and that, as president of Respon-

[5] Respondent sought to explain the absence of Peve's name on the ground that Peve was undergoing hospitalization at the time the list was prepared. Yet it appears that employee Carl Nelson who was also absent from work from October 1971 until after January 13, 1972, was included in the employee roster.

dent, he gave great weight to recommendations of foreman and leadman with respect to hire and discharge of employees. The fact that Peve was paid on an hourly rate rather than on a salary basis is not controlling; not the method of payment or the title, but the functions performed and the authorities possessed or exercised are the criteria for the determination of supervisory status. Finally, the claim that Peve exercised no initiative and made no independent judgment in the myriad situations where he gave orders or made assignments to employees, but that he acted in each instance only on specific directives from foreman Gene Nelson strains credulity.

In determining the supervisory status of a specific individual it is settled law that "section [2(11) of the Act] is to be interpreted in the disjunctive, . . . and the possession of any of the authorities listed in Sec. 2 (11) places the employee invested with this authority in the supervisory class." Ohio Power Co. v. N.L.R.B., 176 F. 2d 385, 387 (C.A. 6, 1949), cert. denied, 338 U.S. 899; N.L.R.B. v. Roselon Southern, Inc., 382 F. 2d 245, 247 (C.A. 6, 1967); Federal Compress & Warehouse Co. v. N.L.R.B., 398 F. 2d 631 (C.A. 6, 1968). Moreover, Section 2(11) of the Act "does not require the exercise of the power described for all of any definite part of the employee's time. It is the existence of the power which determines the classification." Ohio Power, supra, at 388.

On this basis the evidence in the record firmly establishes, and I find, that Carl Peve is a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent as alleged in the complaint.

2. Lester Morrell

The situation respecting Morrell is not too dissimilar from that respecting Carl Peve and the relevant evi-

dence can be more briefly summarized. Respondent's position generally is that Morrell, like Peve, exercised no supervisory functions. Like Peve, too, Morrell was paid on an hourly basis. His hourly rate was $2.65, 65 cents more than the next most highly paid employee in the shipping department where Morrell worked. Morrell's name like Peve's was not included in the roster of rank-and-file employees prepared by Respondent. The reason assigned for that omission in Morrell's case was that Morrell was deemed to be attached to Respondent's office staff. Actually, Morrell had a small office in the immediate area of the shipping dock. Morrell spent most of his working time in the shipping dock area.

Morrell described his own job. He was a shipping clerk, "more or less a lead man." He admitted that when there was more than one truck to be loaded, he "sometimes" picked the fellows to do the loading, that he "frequently" assigned an employee another job when the employee completed the job he was working on, that he would reassign employees, as necessary, when such jobs came in, and that generally his responsibility was to see that the work in the shipping department was done properly, and that there was no "goofing-off." In addition, Morrell was responsible for training new employees in his department and was admittedly consulted consulted by Peve or General Foreman Nelson as to how the employees in his department were developing. Overtime work in the department was frequent but, according to Morrell, he did not direct employees to do overtime work but "asked" them.

Employees Fritch, Bickett and Lambert testified that Lambert was in charge of, and gave orders to the employees in the shipping department. Lambert, who was transferred to that department at his own request was

told by Peve that he would be working for Morrell. According to Lambert, Morrell would make the work assignments to the employees when the buzzer sounded for the beginning for work in the morning, make additional assignments, as needed and reassign employees to take care of such jobs.

There was also extensive testimony by management officials as to Morrell's duties and responsibilities. Mendenhall, assistant to the president, identified Morrell as shipping clerk and, in response to a question as to who was head of the shipping department which had a normal complement of about four employees, replied, "The shipping clerk is head of the department as such." Vernon Pearson testified that Morrell's job was "seeing to it that the trucks were properly loaded and took care of the paperwork on it," and that in the discharge of this function Morrell told the shipping department employees what to do. President Leland Pearson also identified Morrell as shipping clerk but conceded that Morrell could be regarded as shipping department foreman. Leland Pearson also conceded that Morrell would be consulted on occasion when the question of a wage increase for a shipping department employee was raised.

Morrell was, of course, answerable to General Foreman Nelson and to the Pearson brothers. On the other hand, the evidence is clear that subject to that control, Morrell was in complete charge of the shipping department, spent most of his time on the shipping dock, and actively directed the work of the shipping department employees who, in turn, regarded Morrell as their superior. The testimony of both Pearson brothers and Mendenhall essentially confirms that Morrell had this status. Upon all the relevant evidence, and in the light of the precedents and authorities cited in the discussion

concerning Peve, I find that Lester Morrell was a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent as alleged in the complaint.

C. Interrogation and Threats

As already indicated, in late August or early September 1971 a Cooperation Committee was formed to deal with grievances of the employees concerning wage inequities and working conditions. A series of meetings were held between the Cooperation Committee and management regarding these matters and some steps were taken to meet the employee complaints. As already noted also, talk of union organization dwindled when the Cooperation Committee was formed but before too long talk of union organization revived, culminating in the meeting of January 10, 1972, at the Wagon Wheel Tap where a number of the employees signed authorization cards for the Molders Union.

Willaim Wessels, hired as a full-time custodian on October 16, 1971, had his preemployment interview with Vernon Pearson. Pearson explained that the lack of cleanliness in the restrooms and the plant generally was a source of dissatisfaction to the employees and it would be Wessels' job to remedy that situation. Wessels asked whether in view of these troubles, Respondent had any kind of a shop union. Vernon Pearson replied in the negative and explained that Respondent did not need a union, that the problems would be worked out, and that by December the employees would get a raise and would be given grade classifications. Wessels was terminated on January 13, 1972.

In mid-December 1971 employee Marshall Geirnaeirt, terminated on January 13, talked to Vernon Pearson about a raise. The question of raises and wage inequities was

a live issue in the meetings of the Cooperation Committee with Respondent. In that connection Geirnaeirt commented, "The boys are kind of on their horse. You know what's going to happen, don't you? There's going to be a Union." Vernon Pearson replied, "Well, if there is, I'm going to shut the doors." I credit Geirnaerit's testimony.

Harry Fritch, terminated on January 13, testified that on January 10, 1972, the day the Wagon Wheel Tap gathering was scheduled, Peve came to him at the plant in mid-afternoon just before quitting time. Fritch stated that Peve asked whether he was going to the "big meeting." Fritch asked, "What big meeting?" and Peve replied, "You aren't fooling us; we know about it, and I bet I can even tell you who gave you the word." Peve added, "You fellows are going to fool around and they will close the door and we will all be out of a job." Peve denied making any such statement to Fritch. Indeed, Peve, who had returned to work on January 4, 1972 after hospitalization and who worked continuously thereafter during the period of the January 10 Wagon Wheel gathering and the January 13 and 14 layoffs, denied that he had any knowledge of union activity or any awareness of union activity until the week of January 17. In view of the widespread nature of that activity, the layoffs of January 13 and 14, and the discussion of both the activity and the layoffs which admittedly went on in the plant, it is difficult to believe that Peve whose job required him to operate throughout the plant, could have been unaware of such activity and discussion. I credit the testimony of Fritch as to his conversation with Peve on January 10.

The Wagon Wheel gathering of the employees took place later that afternoon after regular working hours. President Leland Pearson was also at the Wagon Wheel

Tap. Thereafter he returned to the plant. William Stephen Walker, who had been a recent employee of Respondent, approached Leland Pearson to ask for reemployment. In the course of the ensuing conversation, Leland Pearson asked Walker if he knew anything about a union being organized. Walker said he did not and Leland Pearson commented that he did not dare talk to any of his employees about union or about any union activity. I credit Walker's testimony.

Bainbridge was among the employees terminated January 13, 1972. The preceding afternoon, according to Bainbridge, Peve asked him what he thought about the union. Bainbridge replied that he was for it. The following afternoon Peve reopened the subject by asking Bainbridge whether he was still of the same mind about the union. When Bainbridge said yes, Peve told him, "You know, you're going to be in big trouble. You and a lot of other boys can lose their jobs over it." Bainbridge replied, "I can't afford to lose my job but I think this place needs a union to clean it up." He added, "It's a hell of a shame I can't voice my own opinion without something like this happening."

Very shortly after this conversation, at quitting time, nine employees, Bainbridge among them received their termination notices. Peve, of course, denied engaging in the quoted conversations with Bainbridge. For reasons set forth in connection with the Fritch incident, I do not credit Peve's denial and find that the conversations occurred as Bainbridge testified.

Employee Edwin Jones, according to his testimony, had a similar experience. Jones testified that during the noon break on January 12 Peve approached him, and adjuring him to tell the truth, asked whether re was for a union. Jones replied, "Yes, I am for a union.

We need one here." Peve shook his finger in Jones' face and said, "That's all I wanted to know." Jones' employment was terminated on January 14. As with Fritch and Bainbridge, Peve denied that this conversation occurred. I credit the testimony of Edwin Jones.

LaVern Charlet, manager of the industrial and municipal equipment division and admittedly a supervisor and agent of Respondent, was also involved in the matters here under consideration. Leonard Dunn was among the nine unions adherents laid off at quitting time on January 13. Immediately upon receiving his termination notice, Dunn walked into the truck mount office where Charlet was engaged in a conversation with Bruce Bryner and employee Vern Frail. Charlet volunteered that "if the plant went Union why Lee [Leland Pearson] would shut the place down." Dunn, obviously upset at and move the son-of-a-bitch to Russia." Charlet admitted that he had had a conversation with Dunn at the time and place and under the circumstances to which Dunn testified but stated that to "the nearest of my recollection" the conversation consisted of Dunn's statement that he would never have been laid off if there had been a union in the plant and Charlet's rejoinder that he did not think anyone at Pearsons was interested in a union. To the question whether he was said Leland Pearson would shut down the plant if it went union, Charlet first replied, "No, sir, I don't believe I made any statement like that," and upon further questioning by Respondent's counsel, stated that he did not make a statement like that. I find Dunn's recollection more certain and accurate in this regard and conclude that Charlet did make the statement in question.

Leland Pearson, Vernon Pearson and LaVern Charlet are admittedly supervisors and agents of Respondent.

The evidence relating to their conduct and statements, summarized above, adequately justifies a finding of interogation and threats violative of Section 8(a)(1) of the Act. The conduct and statements of Carl Peve, whom I have found to be also a supervisor and agent of Respondent, furnish additional instances of coercive interrogation and threats. In sum, the evidence amply warrants a finding that Respondent violated Section 8(a)(1) of the Act.

D The Discharges on January 13 and 14, 1972

Respondent employed about 75 production and maintenance employees. Respondent had never had a major layoff. Beginning on January 10, 1972, and within 2 days thereafter, 22 of these 75 employees signed cards designating the Molders Union as their bargaining representative. On January 13 and 14, 12 of these 22 card-signers were terminated, 9 on January 13, 3 more on January 14. No nonunion adherents were terminated.

Respondent had occasion to learn the identity of the employees who were union adherents. Ten of the 12 employees who were terminated attended a meeting at a tavern in Galva, Illinois, known as the Wagon Wheel Tap, on the afternoon of January 10, following the end of the regular work shift.[6] Harry Lambert, a prime mover in the union organizational campaign, arranged the meeting to rally support for the Molders Union by obtaining signatures to authorization cards. As indicated by Peve's inquiry of employee Fritch as to whether Fritch was going to the "big meeting" and by Peve's accompanying

[6] These 10 employees were James Bainbridge, Harry Lambert, Harold Potter, Leonard Dunn, Jerry Smith, Harry Fritch, Marshall Geirnaeirt, Edwin Jones, Bernard Strouse and William Washburn.

comments, it is apparent that Peve, at least, knew about the meeting before it took place. Lester Morrell, already identified here, was present at the meeting.[7] Leland Pearson, Respondent's president, and LaVern Charlet, manager of Respondent's industrial and municipal division, came into the tavern during the course of the meeting and stayed for a while.[8] Morrell, of course, and Leland Pearson and Charlet also, had an opportunity to observe who was present.

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[7] Morrell did not sign a card. He informed Strouse, in response to the latter's inquiry, that he did not sign a card because it would hinder his chances of getting a salaried position. In reply to a similar inquiry Morrell told Bainbridge that he could not sign a card because he was boss. According to Strouse and Bainbridge, Morrell was present at the tavern while the cards were being signed. Morrell testified that he did not arrive at the tavern until 5:00 p.m., that he did not know union cards were being signed and that he did not know about the card-signing until he heard it being discussed in the plant the following day, January 11. Even on Morrell's version, he knew as of January 11 that the employees at the tavern were signing union cards.

[8] Leland Pearson testified that he went to the Wagon Wheel Tap only infrequently. Several employees who were regular patrons testified they had never seen either Leland Pearson or LaVern Charlet there before. Leland Pearson explained the striking coincidence of his presence of this particular occasion on the ground that he wanted to have a private business conference with Charlet because each of them were leaving on separate business trips and it was difficult for them to have a private uninterrupted conference at the plant. The explanation seems somwhat strained. Moreover, inasmuch as Leland Pearson knew that a number of his employees regularly patronized the Wagon Wheel Tap after work, the explanation is even more strained. However, surveillance was not alleged. The fact remains that Pearson and Charlet were present and Pearson admittedly saw at least some of the employees who were present.

The 11th and 12th employees terminated, Joseph Bickett and William Wessels, were not at the meeting. However, Morrell had had discussions concerning the union with each of them prior to their terminations.

General Counsel argues that these facts alone, that all 12 employees who were terminated were union adherents, that union adherents were far the lesser part of Respondent's employee complement and that Respondent had opportunity to know of the identity of the union adherents, are themselves cogent evidence of unlawful discrimination. In support of this position General Counsel cites F.W.Woolworth Company, 25 NLRB 1362, 1372-1374 (1940), enforced in pertinent part, 121 F. 2d 658 (C.A. 2, 1941); N.L.R.B. v. Camco, Inc., 340 F. 2d 803 (C.A. 5, 1965); Montgomery Ward & Co., Inc., v. N.L.R.B, 107F. 2d 555 (C.A. 7, 1939). Supplementing this contention is the evidence, already summarized, that Respondent regarded the advent of a union among its employees with considerable disrelish and, as manifested by the statements ofadmitted supervisory officials as well as by the statements of Peve, made no secret of its hostility to union organization.

It is arguable that, without more, these facts would warrant a finding of discriminatory discharge. I find it unnecessary to, and no not adopt, this contention. However, the showing here made calls at the very least, for a critical scrutiny of the reasons assigned by Respondent for the terminations. See Montgomery Ward & Co., Inc. v. N.L.R.B., supra.

These reasons are twofold: first, that a decline in Respondent's operational needs justified a reduction in Respondent's workforce for economic reasons, and, second, that the determination of which employees to release was made on the basis of the importance of particular

jobs to the continued operation of the plant on a reduced production schedule and the versatility of the employees to handle those jobs.

As to the first reason General Counsel, neither at the hearing nor in its brief, contests the proposition that a reduction in force for economic reasons at the time of the terminations would have been justified. Apart from other considerations, President Leland Pearson learned on January 12, 1972, that Avco New Products, a major customer of Respondent, was not going to renew its order. On this state of the record I find that a reduction in force for economic reasons would have been justified.

Respondent's corollary defense is that the terminations were made pursuant to its determination to cut the workforce for economic reasons and that the criterion for the cut was the importance of the job and the versatility of the employee. Here Respondent's position was sharply challenged.

Vernon Pearson testified that the decision as to which employees to terminate was made by him and his brother Leland Pearson on the morning of January 13 and that he and his brother had worked on the decision on the evening of January 12 and on January 13. According to Vernon Pearson, he consulted with General Foreman Nelson and John Mercer, head of the fabricating department, before the final decision was made and was not sure whether he had also had a discussion with Carl Peve in that regard. Vernon Pearson initially testified that the criteria governing the selection were the importance of the job to the continuing business, the versatility of the particular employee, his attendance record, his cooperativeness and his seniority. Confronted with a sworn affidavit he had previously furnished the Board,

Vernon Pearson agreed that he had there made no mention of cooperativeness and, on further examination, reaffirmed his express statement in the affidavit that seniority of the employees was not a factor in the determination. Vernon Pearson also acknowledged that no part-time employee had been laid off, that for several weeks prior to the instant hearing there was a substantial amount of overtime work for which Respondent paid time and a half, that Respondent was currently behind in its production and that, notwithstanding, none of the 12 employees terminated on January 13 and 14 had been recalled.

Leland Pearson testified that he learned of the loss of business from Avco New Products at a meeting which he and E.L. Mendenhall, his assistant held with officials of Avco New Products on January 12 at the latter's plant in Coldwater, Ohio. According to Leland Pearson, he called his brother, Vernon Pearson, that night, informed him that a layoff would be required, and discussed with him how to implement the layoff so as to maintain production at a reduced rate. Leland Pearson further testified that Respondent had no layoff procedure and no seniority system, and that the criterion applied to determine layoff or retention was the versatility of the particular employee to do the jobs which would be required in a reduced operation.

General Foreman Nelson, confirmed that he had discussed the impending layoffs with Vernon Pearson a couple of days before the termination notices were issued. According to Nelson, he advised Vernon Pearson of at least eight employees whose services could be dispensed with in a reduced operation, citing either inadequate work performance or some other reason for his recommendation. Reminded that he had furnished an affidavit to

the Board about 2 months prior to the hearing and a month after the layoffs, Nelson acknowledged that the affidavit recited only one employee he had recommended for layoff, Harry Lambert. As already noted, Harry Lambert was a prime mover in the organizational campaign.

In sum, it appears that despite testimonial suggestions of a variety of reasons which allegedly entered into the layoff determinations, the only asserted reason which emerged was the versatility of the particular employee for continued operation of the plant on a reduced productivity schedule. This asserted ground must in the first instance explain the striking coincidence that its application led to the discharge of 12 of the 22 union adherents and that every one of the 50 or more nonunion employees survived this test.

Moreover, even as applied to the 12 employees terminated, Respondent's asserted ground is vulnerable.

(1) James Bainbridge was hired by Respondent in September 1970 as a spray painter. His wage rate was $3.50 per hour and he was classified as Labor Grade 6, the next to the highest labor grade in Respondent's labor grade scale.* Bainbridge who had long experience

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*The data relating to labor grade and wage scale derives from a roster of Respondent's work force prepared by Respondent late in December 1971 and accurately reporting the status of the work force as of January 3, 1972. The roster, introduced into evidence as General Counsel's Exhibit 2, contains a list of the employees, their starting dates, their rates of pay as of January 3, 1972, and their labor grades ranked from No. 1 to No. 7 with the higher labor grades ranked from No. 1 to No. 7 with the higher labor grades awarded to those employees with greater skills. Respondent contends that the roster reflected a rating of the jobs and not of the individuals who held those jobs. The claim is suspect inasmuch as Respondent was free to assign the individual it deemed most

as a painter, was the only employee who painted liquid manure spreaders, a major item in Respondent's product inventory. At the hearing, Respondent indicated that it had been dissatisfied with Bainbridge's work performance since September 1971 and suggested that he indulged in alcoholic beverages. As to the latter allegation, the evidence is clear that Bainbridge never missed a day's work and did a great deal of overtime work. Respondent did run an advertisement for 3 days for a spray painter but, significantly, this advertisement first appeared on January 11, 1972, the day following the meeting at the Wagon Wheel Tap, a meeting which Bainbridge attended. Respondent obtained no replacement for Bainbridge and at the time of the hearing was subcontracting out the painting of truck mounts at admittedly high rates.

(2) Harry Lambert was hired in August of 1970 as a laborer and was later transferred to the shipping department. In both jobs he performed a variety of functions including substituting for Morrell in the shipping department when the latter was absent. Lambert was hired at $2.40 an hour and during the course of his employment received four raises, the last on January 3, 1972. In labor grade 4 at $3 per hour, Lambert was the highest paid employee in the shipping department. Immediately below him was Joseph Bickett in labor grade 3 at $2.80 per hour. Bickett was also discharged. Not discharged but retained were Galloway and Simmons, the other two employees in the shipping department who

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[9] (continued)
qualified to any particular job, the designation of labor grade was within its discretion, and the roster admittedly included pay raises effective January 3 which one may fairly assume reflected Respondent's evaluation of the work performance of the employee on the particular job.

were classified in labor grade 2 and received $2.60 an hour. Unlike Lambert and Bickett, Galloway and Simmons were not union adherents and did not attend the Wagon Wheel Tap meeting. Respondent complained that Lambert was guilty of "a lot of standing around." Only one specific instance was cited occurring in December 1971. Yet Respondent gave Lambert a raise as of January 3, just 10 days before his termination.

(3) Joseph Bickett was employed by Respondent in July 1970 on the part-time shift in the paint room and within a few months was transferred to the full-time shift in the shipping department. As already noted, Bickett at $2.80 an hour in labor grade 3 was second only to Harry Lambert in the shipping department and was above Galloway and Simmons in both pay scale and labor grade. In both the paint room and in the shipping department, Bickett performed a variety of jobs.

(4) Harold Potter hired in August 1970, was initially assigned to a number of different jobs in Respondent's operation and was finally assigned to assist Marshall Geirnaeirt. In addition to grinding the parts which Geirnaeirt cut out, Potter processed these parts into finished products utilizing various machines to punch or drill holes, ream the holes, and tap or thread them as appropriate. Potter was the only employee doing this work. His labor grade was 4 and he was one of those given a 15-cent raise as of January 3, 1972. Despite his versatility, Respondent terminated his employment 10 days later on the ground that his services were no longer needed.

(5) Leonard Dunn, was hired in February 1970 and worked in the truck mount department where he performed a number of operations. At the outset some of his time was spent running errands and picking up tools

and supplies needed thruout the factory. The latter aspect of his work grew and by the time of his layoff, Dunn was spending most of his time running errands and making deliveries of spreaders to customers within a 100-mile radius of Respondent's plant. Dunn was in labor grade 3 at $2.55 an hour. Respondent noted that Dunn had trouble standing on his legs too long. However, Respondent was aware of this problem when Dunn was hired. This disability on Dunn's part was due to a heart condition whch resulted in his occasional absence for a day or part of a day for medical treatment.

(6) Jerry Smith was hired in May 1970 and worked in the tank department. He received four raises, including a raise of 15 cents on January 3, 1972, raising his salary from $2.40 and hour to $2.90 an hour. He was in labor grade 4. Smith performed a variety of jobs including maintenance welding when the construction and repair crew was too busy to do such welding. Of the several employees in the tank department, only Smith and Strouse attended the Wagon Wheel Tap meeting. Only Smith and Strouse were laid off from that department.

(7) Harry Fritch was hired into the construction and repair department in July 1970. He was later transferred to the shipping department where he got a raise and, in September 1971 went to the paint department. Fritch's labor grade was labor grade 2; his salary was $2.60 an hour. Thomson also at labar grade 2 in the paint department was paid $2.50 an hour and Paxton, a labor grade 1 in the paint department, was paid $2.20 an hour. Neither Thomson nor Paxton were terminated.

(8) William Wessels was hired in October 1971 as a custodian to take care of deplorably dirty conditions in the restrooms and the rest of the plant about which

the employees were complaining. The record establishes that Wessels did a good job in rectifying this situation. Although there is no indication that the need for Wessels' services abated, Respondent included him among the employees terminated. Wessels was in labor grade 2 at $2.50 an hour.

(9) Marshall Geirnaerit was hired in April 1967 at $2.25 an hour. During his employment with Respondent Geirnaeirt performed about every job in the shop and his versatility in that regard was known to Respondent. His basic job at the time of his dischargewas operating a flame cutter to cut patterns out of plate metal. Some time before his discharge, Respondent installed a new and improved flame cutter. Respondent indicated that it had a growing dissatisfaction with Geirnaeirt's work in that he was reluctant to change procedures with the old cutter and was also reluctant to adapt to the use of the new cutter. The dissatisfaction, however, would appear to have been quite recent inasmuch as Respondent gave him a 15-cent per hour raise on January 3, 1972, 10 days before the layoff, and classified him at labor grade 5 at a top wage of $3.30 an hour. More significant perhaps is the fact that Leland Pearson admittedly saw Geirnaeirt at the Wagon Wheel Tap meeting on January 10.

(10) Edwin Jones was a very junior employee classified at labor grade 2 in the paint department and was paid $2.50 an hour. At least one employee in that department was below him. Paxton was classified at labor grade 1 at $2.20 an hour.

(11) Bernard Strouse went to work for Respondent in September 1971. Vernon Pearson, who hired Strouse, commented on his broad experience. Strouse had performed all kinds of welding and carried the title of Cer-

tified Welder. He was put to work in the tank department where he did all varieties of welding and assembly operations and was complimented on his work. He was classified in labor grade 5 and was paid $3.25 an hour. Three lower rated employees in the department were not laid off. Vernon Pearson, commenting on Strouse's termination, testified that, according to Mercer, Strouse was not "a pretty good welder," but Mercer did not take the stand to verify that statement.

(12) William Washburn was hired on September 22, 1971 as a dipper in the paint department at $2.50 an hour. He was in labor grade 3 and, on January 3, 1971, was raised to $2.65 an hour. In addition to dipping and some spray painting Washburn did various odd jobs. Two lower rated employees in the department, at labor grades 1 and 2 respectively, were not laid off.

The net of the foregoing summaries is that in several of the instances Respondent's contention that the people terminated were the least versatile and were unsuited to the needs of a business which was going to be operated on a reduced basis is wholly unsupported. Even on the assumption that such a conclusion would have been warranted in a few instances, the claim advanced by Respondent that this was the guiding consideration in all 12 instances is patently untenable. Rather the evidence taken in its totality points inevitably to the proposition that the unifying thread in all 12 terminations was the union adherence of the employees involved. Respondent had ample opportunity to learn of the union adherence. Its hostility to union organization, disclosed by its coercive interrogation and threats, was manifest. Moreover, its hostility was unremitting. Notwithstanding the fact that as of the time of hearing Respondent was behind in its production and that considerable overtime at time and one-half was required, Re-

spondent did not recall any of the 12 employees who were laid off, ostensibly, for lack of work.[10]

On all the evidence of record and after due consideration of the arguments and authorities urged by the parties, I conclude and find that Respondent did not on January 13 and 14, 1972, carry out a reduction in force for economic reasons, a course of conduct which would have been warranted, but instead utilized the stratogem of a reduction in force as a pretext to rid itself of union adherents. Accordingly, I find that by terminating the employment of the 12 employees, named in the complaint, on January 13 and 14, 1972, Respondent violated Section 8(a)(3) and (1) of theAct.

Conclusions of Law

1. Carl Peve and Lester Morrell are supervisors of Respondent within the meaning of Section 2 (11) of the Act and are agents of Respondent as alleged in the complaint.

2. By coercively interrogating its employees concerning union activities and by threatening them with re-

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[10] Toward the end of the hearing the parties stipulated that 9 of the 12 employees terminated, Bainbridge, Dunn, Jones, Lambert, Geirnaeirt, Bickett, Wessels, Potter, and Smith, applied for unemployment compensation with the State of Illinois Department of Labor and in response to a question posed by that agency reponded that they lost their last jobs because of lack of work.

This was, of course, the thrust of the termination notices which the employees received on January 13 and 14. The date of the applications for unemployment compensation and the surrounding circumstances do not appear. Under the circumstances and weighed against the evidence adduced in the instant hearing, I can attach little, if any, probative weight to the facts alleged in the stipulation.

prisals for engaging in union activities, Respondent has violated Section 8(a)(1) of the Act.

3. By laying off and/or discharging the following named employees:

James Bainbridge
Joseph Bickett
Leonard Dunn
Harry Fritch
Marshall Geirnaeirt
Bernard Strouse
Harry Lambert
Harold Potter
Jerry Smith
William Wessels
Edwin Jones
William Washburn

because of their union union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

To effectuate the policies of the Act, I find it necessary and appropriate to order Respondent to cease and desist from the unfair labor practices found and, because of the character and scope of these unfair labor practices, from infringing in any manner upon the rights guaranteed in Section 7 of the Act.[11]

The unfair labor practices found also dictate the propriety of directing affirmative remedial action. Accordingly, I shall direct Respondent to reinstate the 12 em-

[11] Brad's Machine Products, Inc., 191 NLRB No. 15 (1971).

ployees, above-named, who were laid off and/or discharged on January 13 and 14, 1972, to their former positions or, if such positions no longer exist, to substantially equivalent positions, and to make these employees whole for earnings lost as a result of their wrongful terminations by payment to each of them of a sum of money equal to that which each would normally have earned, absent the unlawful discrimination, from the date of his termination to the date of Respondent's offer of reinstatement, less their net earnings, if any, during said period. Backpay shall be computed in the manner prescribed in F.W. Woolworth Co., Inc., 90 NLRB 289, and interest shall be added as prescribed in Isis Plumbing & Heating Co., 138NLRB 716.

To facilitate and achieve these ends the remedial order will include the customary record-keeping and notice-posting provisions.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10 (c) of the Act, I recommend the following:

ORDER[12]

Respondent, the Pearson Bros. Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating any of its employees concerning union activities, or threatening employees with reprisals for engaging in such activities.

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[12] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Laying off, discharging, or otherwise discriminating against any employee for supporting International Molders & Allied Workers Union, AFL-CIO; Chauffeurs, Teamsters and Helpers, Local No. 15, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; or any other labor organization.

(c) In any other manner interfering with retheir rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer the individuals named hereunder immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and to make them whole for their lost earnings in the manner set forth in the section of the Trial Examiner's Decision entitled "Remedy." The individuals are:

James Bainbridge	Harry Lambert
Joseph Bickett	Harold Potter
Leonard Dunn	Jerry Smith
Harry Fritch	William Wessels
Marshall Geirnaeirt	Edwin Jones
Bernard Strouse	William Washburn

(b) Notify immediately the above-named individuals if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copy-

ing, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in Galva, Illinois, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Officer-in-Charge of Sub-Region 38, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to see that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Officer-in-Charge, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C. July 17, 1972.

/s/ Arnold Ordman
Arnold Ordman
Trial Examiner

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

On July 17, 1972, Administrative Law Judge[1] Arnold Ordman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided ot affirm the rulings, finding,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

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[1] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

[2] The Administrative Law Judge inadvertently substituted, in sec. II, B, 2, of his Decision, "Lambert" for "Morrell" as being in charge of the shipping department. That statement is hereby corrected to read, "Employees Fritch, Bickett, and Lambert testified that Morrell was in charge of, and gave orders to, the employees in the shipping department."

[3] In adopting the Administrative Law Judge's conclusion that the layoffs were discriminatorily motivated, we note that such conclusion is further strengthened by evidence not cited in his Decision. On January 14, 1972, employee Washburn, known by Respondent to have attended the union meeting on January 10 and to have signed a union authorization card, questioned Supervisor Peve concerning the nine employees laid off, on January 13. Peve's response was, "You know damned well what happened. If you don't keep your mouth shut, you'll be next," and Washburn was laid off that night. Thus, we find that, while the evidence relied on by the Administrative Law Judge is sufficient to support the finding that the layoffs

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, The Pearson Bros. Company, Galva, Illinois, its officers, agents, successors and assigns shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. October 31, 1972.

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were violative of Sec. 8(a)(3) and (1) of the Act, Peves reply provides additional conclusive evidence that Respondent discriminatorily selected the union adherents for layoff.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before: LUTHER M. SWYGERT, Chief Judge, LATHAM CASTLE, Senior Circuit Judge, and ROBERT A. SPRECHER, Circuit Judge.

THIS CAUSE came to be heard upon a petition to review, and on a cross-application for enforcement of, an order of the National labor Relations Board dated October 31, 1972, against The Pearson Bros. Company, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on September 18, 1973, and has considered the briefs and transcript of record filed in this cause. On October 2, 1973, the court being fully advised in the premises, handed down its order denying the petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, IT IS ORDERED AND ADJUDGED by the United States Court of Appeals for the Seventh Circuit that the petition for review filed by The Pearson Bros. Company, be and it is hereby denied; and that the said order of the National Labor Relations Board in said proceeding be enforced, and that The Pearson Bros. Company, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Petitioner.

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No. 73-1263

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In the Supreme Court of the United States

OCTOBER TERM, 1973

THE PEARSON BROS. COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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1. The Board found that The Pearson Bros. Company (the Company) violated Section 8(a)(1) of the National Labor Relations Act by interrogating employees concerning union activities, threatening employees who engaged in union activities with loss of their jobs and threatening to close its plant if the union campaign were successful (Pet. App. 11a-15a). Additionally, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by laying off or discharging 12 employees for engaging in union activity. This conclusion was based on the finding that the Company "did not on January 13 and 14, 1972, carry out a reduction in force for economic reasons, a course of conduct which would have been warranted, but instead utilized the stratagem of a reduction in force as a pretext to rid itself of union adherents" (Pet. App.

26a). The Board entered an appropriate remedial order (Pet. App. 28a-30a), which the court of appeals enforced (Pet. App. 35a-37a).

2. The petition rests on the premise that the layoff of the 12 employees was motivated by economic considerations. The Board found, however, and the court of appeals sustained its finding, that the layoff was in fact motivated by anti-union considerations. In these circumstances, the petition presents only an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. Moreover, the facts detailed in the Board's decision (Pet. App. 15a-26a) and in the court of appeals' opinion (Pet. App. 35a-37a) demonstrate that the Board's finding is supported by the record.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MARCH 1974.